## APPENDIX A

## OPINION OF THE COURT OF APPEALS

The People of the State of Michigan,
Plaintiff-Appellee,
v.
Ewell C. Qualls,
Defendant-Appellant.
} Calendar No. 3317

Before: Lesinski, C. J., J. H. Gillis and T. G. Kavanagh, JJ.

Lesinski, C. J.

The defendant, Ewell C. Qualls, was convicted by a jury of the crime of manslaughter* and sentenced to prison.

The facts reveal that on April 3, 1965, the Highland Park police department was summoned to an address in that city to investigate a shooting. Upon arrival, the officers observed the defendant in the doorway with a revolver in his hand. The defendant motioned for the police to enter, whereupon the bodies of one Ervin Kopas and Mervyn Shewell were found therein. The defendant was subsequently arrested, stood trial and was convicted of voluntary manslaughter in the death of Mervyn Shewell.

On appeal, as his first assignment of error, the defendant contends the trial court abused its discretion by failing to grant a motion for a mistrial when it was brought to the court's attention that the brother of Ervin Kopas had heaped verbal abuse on defense counsel, allegedly in the presence of a juror. The brother was questioned by the

* CL 1948, §750.321 (Stat Ann 1954 Rev. §28.553).

court in the absence of the jury about the incident and his account in response was as follows:

> "The Court: Were there other people in the elevator?
>
> "Mr. Kopas: Yes, there was my wife and some counsel of his [defendant]. That to my awareness was all that was in the elevator, and as to regards as to what I recall exactly what I said, I said, I asked him, I said, 'Are you happy in your chosen profession?' I said, 'I hope you're happy in your chosen profession,' and I didn't recall the response that I got from him, and *there was no mention whatsoever of Qualls.* I just told him that my opinion of him was very low in his type of line of work he's doing and if there was a hell anywhere he would find it, and that's exactly as far as I can remember, that was the exact words. *There was no mention of this particular case,* or in essence it was just like he says, a personal attack on his character." (Emphasis supplied.)

The trial judge recalled the members of the jury and inquired of them collectively, "if you can recall or think of any incident or occurrence outside of the courtroom which would in any way influence your thinking, or your verdict in this case, or tend to prejudice you in any way against one side or the other." This inquiry failed to elicit an affirmative response from any of the jurors, whereupon the judge asked if counsel for the respective sides had any other questions for the jury. Both counsel stated they had no further questions.

The defendant on appeal contends that the trial judge abused his discretion in denying the motion for a mistrial, and further, that the investigation made by the trial judge concerning the verbal attack on defense counsel, reportedly

in the presence of a juror, was not complete enough to ascertain whether defendant had been prejudiced by the incident. The record does not reveal the abuses the defendant herein urges.

When the trial court learns of an incident, such as happened in this case, arising during the progress of the trial, fairness to the defendant requires that the trial judge ascertain its prejudicial effect. And whether or not the circumstances establish that a mistrial should be declared rests in the sound discretion of the trial judge. *People v. Bigge* (1941), 297 Mich 58. Moreover, a mistrial should not be declared in consequence of any mere irregularity which is not prejudicial to the rights of the defendant. *People v. Watson* (1943), 307 Mich 596.

In *People v. Schram* (1966), 378 Mich 145, our Supreme Court was confronted with the same problem as in the instant case. The rule adopted in *Schram, supra,* was that not every improper contact with a jury presents grounds for a mistrial and the appellate court will reverse only when prejudice is affirmatively shown or facts clearly establishing the inference that it occurred from what was said or done. See, also, *People v. Nick* (1960), 360 Mich 219.

Assuming *arguendo* that the trial judge should have been more extensive in his inquiry, the position that defendant herein urges is certainly inconsistent with his position at trial, that he was satisfied with the court's inquiry and had no further questions. This Court views the defendant's present position as an afterthought and that by failing to make further requests of the trial judge, the defendant has effectively waived the opportunity to do so. It has been said on good authority that "It is only in furtherance of good practice to hold that a defendant who chooses to take the chances of an acquittal on the merits,

without complaining of irregularities at the trial, waives his objections." 2 Gillespie, Michigan Criminal Law and Procedure (2nd ed), §715, p. 909. We find that the inquiry of the trial judge, while not exhaustive, was sufficient under the facts presented to satisfy the spirit of *Schram, supra,* and justified the denial of the motion for a mistrial.

In his second assignment of error, the defendant contends that certain admissions elicited from him during in-custody interrogation were improperly admitted into evidence. In support of his contention, he directs our attention to *Miranda v. Arizona* (1966), 384 US 436 (86 S Ct 1602, 16 L ed 2d 694, 10 ALR 3rd 974). The defendant's position is persuasive in that prior to questioning by the police, although he was advised of his right to counsel, he was never advised that this right included "retained or appointed" counsel. Certainly advising the defendant that he had a right to counsel without informing him that counsel would be appointed if he was without funds is contra to the spirit and the language of *Miranda, supra.* See also, Harvard Law Review, 1966-67, p. 201, vol. 80:91.

The position that the defendant maintains on appeal is again, however, inconsistent with his posture in the lower court. The record reveals that the statements made by defendant which he now contends were inadmissible at the trial, were, in fact, carefully scrutinized by him when defense counsel cross-examined the people's police witnesses. We will not speculate as to the purpose of defense counsel's approach but find that in the absence of an objection in the court below, he is in no position to complain. *People v. Bauman* (1952), 332 Mich 198.

It is settled law that the failure to object to alleged errors in the lower court precludes their being raised for

the first time on appeal. However, in *People v. Paul F. Baker* (1967), 7 Mich App. 471, 475, this Court stated:

> "However, this Court in observing this general rule, will exercise its 'prerogative of searching for error which reflects clear injustice.' *People v. Hicks* (1966), 2 Mich App. 461, 463. 'The inherent power of this Court to prevent fundamental injustice is not limited by what appellant is entitled to as a matter of right.' *People v. Dorrikas* (1958), 354 Mich 303, 316."

Viewing the entire record, we find that the defendant has suffered no "clear injustice" and his failure to raise an objection in the trial court precludes him from raising it here.

Lastly, the defendant contends that the record fails to demonstrate that the jury verdict was supported by the evidence and further that his motion for a directed verdict, made at the close of the prosecution's case, should have been granted. The defendant's motion was based upon the allegation that the prosecution had failed to introduce testimony from which the jury could reasonably infer that the element of provocation necessary for the crime of voluntary manslaughter was present.

At trial, the court took the defendant's motion under advisement and defense counsel then presented his case. The defendant testified as to the circumstances surrounding the homicides. The defendant's testimony, this Court finds, sufficiently warranted the denial of the motion and supported the ultimate verdict of guilty.

On direct examination the defendant testified:

> "Q. And what did Larry [the decedent Shewell] say?

A. Well, just like he said, 'I can't do nothing with him' and he said, 'Besides its a hell of a note to have somebody in your house and then call the cops on them and start arguing.' "

The defendant expressly admitted on direct examination to having an argument with the decedent Shewell as follows:

"Q. What about Mr. Shewell? What, if anything, did he do when Mr. Kopas started toward you around the table?

A. Well, I don't know whether he was after Kopas or coming to help him. I don't know. I know we was in an argument though. We had been arguing.

Q. Well, when had you argued with Mr. Shewell?

A. Well, about the same time that when he said, 'I'm going upstairs,' Kopas.

Q. What did Shewell say?

A. Well, he was kept on hollering about going to call the cops."

Further on cross-examination the defendant testified:

"Q. What happened then? Was Larry seated or standing at the time?

A. Well, when it first started he was seated, and when I told him, I said, 'Well, if you don't get him out of here I'm going to call the police,' then that kind of irked him, and started you know, 'Pretty good, sitting here drinking with you, and call the police on us.'

Q. Larry said that?

A. Yes, and we got into quite a little argument there about it.

Q. You are Larry?
A. Yes."

The direction of a verdict is, of course, addressed to the sound discretion of the trial court, and the trial judge should not direct a verdict where there is sufficient evidence to submit the case to a jury and justify a conviction. *People v. Sullivan* (1939), 290 Mich 414. In the instant case, although at the time of defense counsel's motion the prosecution had not conclusively demonstrated the presence of provocation, the subsequent testimony of the defendant supplied the deficiency. When testimony supporting the prosecution's theory is subsequently supplied by the defendant, the trial judge is correct in denying a motion for a directed verdict. *People v. Barlow* (1903), 134 Mich 394.

The defendant's testimony revealed that the three men had been drinking for several hours prior to the homicide. In addition, the aforementioned testimony revealed that "quite a little argument" had developed. It was therefore not unreasonable for the jury to infer that the alcohol, coupled with the developing argument, were the ingredients which caused the defendant to respond rashly and without deliberation. The question of the defendant's state of mind at the time of the homicide was properly a question of fact for the jury, and based upon the record we find no reason to interfere with their conclusion. See 3 Gillespie, Michigan Criminal Law and Procedure (2nd ed), §1665, p. 2007.

Affirmed.

## APPENDIX B

### ORDER DENYING MOTION FOR REHEARING

(Michigan Court of Appeals)

At a session of the Court of Appeals of the State of Michigan, held at the Court of Appeals in the City of Detroit, on the 29th day of April in the year of our Lord one thousand nine hundred and sixty-eight.

Present the Honorable T. John Lesinski, Presiding Judge, John H. Gillis, Thomas Giles Kavanagh, Judges.

In this cause a motion for rehearing is filed by defendant-appellant and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is ordered that the motion for rehearing be, and the same is hereby denied.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 1st day of May in the year of our Lord one thousand nine hundred and sixty-eight.

Ronald L. Dzierbicki,
Clerk.

## APPENDIX C

### ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(Michigan Supreme Court)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 23rd day of July in the year of our Lord one thousand nine hundred and sixty-eight.

Present the Honorable John R. Dethmers, Chief Justice, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Michael D. O'Hara, Paul L. Adams, Thomas E. Brennan, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby denied, as defendant and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous. It is further Ordered that the bond filed by defendant and appellant pursuant to an order of the circuit court for the county of Wayne, dated February 6, 1967, which was continued by order of this Court dated May 10, 1968, be cancelled.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

**In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 23rd day of July in the year of our Lord one thousand nine hundred and sixty-eight.**

**Harold Hoag,**
**Deputy Clerk.**

## APPENDIX D

## MOTION FOR REHEARING

(Michigan Court of Appeals)

NOTICE

TO: William L. Cahalan,
Prosecuting Attorney,
City-County Building,
Detroit, Michigan 48226.

Please take notice that the within motion for rehearing will be heard in the Court of Appeals for the State of Michigan on the 16th day of April, 1968 at 10:00 a.m. in the forenoon in accordance with the rules of that court.

Riseman, Lemke & Piotrowski,
Attorneys for Defendant,
By: Harry Riseman,
731 Penobscot Building,
Detroit, Michigan 48226.

Dated: March 29, 1968.

MOTION FOR REHEARING

Now comes the defendant and moves this Court to enter an order granting him a re-hearing or in the alternative either grant his motion for acquittal directed to the trial judge or reverse the conviction entered in the lower court and award him a new trial and for the following reasons:

1. That defendant was denied his rights accorded him by the constitution of the United States and especially the Sixth and Fourteenth Amendments thereof.

2. That the defendant was denied his rights accorded him by the constitution of the State of Michigan and especially Article I, Section 17 thereof.

3. That the trial judge should have granted defendant's motion for a mistrial as a matter of law since one accusing his counsel as being "A degenerate for representing him" in the presence of a juror "involved such a probability that prejudice would result and was deemed lacking in due process."

4. That the trial judge as a matter of law was required to conduct an examination of the charges contained in the motion for mistrial including the involved juror.

5. That this Court made a factual finding with respect to such charges based solely upon the statement of Mr. Kopas, the party accusing trial counsel in the presence of a juror.

6. That the trial judge was without authority to take a motion for acquittal at the conclusion of People's case under advisement.

7. That the defendant was denied his constitutional rights when such was done and when he was required to make an election as to whether he should rest upon his motion or testify in open court.

8. That since such motion was meritorious and should have been granted, the trial judge could not make a determination thereof subsequent to the trial and using defendant's testimony as a basis for its denial.

9. That Miranda v. Arizona is applicable to the statements made by defendant to police officers at the

time of his arrest and could not be waived by his counsel.

10. That defendant was denied the right of an impartial trial by jury accorded him by the constitution of the United States and the constitution of the State of Michigan.

This motion is based upon the files and records of this Court; supporting brief; and affidavit of Harry Riseman which is made a part hereof.

Riseman, Lemke & Piotrowski,
Attorneys for Defendant,
By: Harry Riseman,
731 Penobscot Building,
Detroit, Michigan 48226.

Dated: March 29, 1968.

AFFIDAVIT OF HARRY RISEMAN

State of Michigan,
County of Wayne—ss.

Harry Riseman being duly sworn deposes and says that he is the attorney for the defendant in the above entitled cause and that he verily believes that the defendant is entitled to a rehearing for the reason set forth in the petition now on file with this court.

Harry Riseman.

Subscribed and sworn to before me this — day of March, 1968.

.....
Notary Public, Wayne County, Michigan.
My commission expires .....